No. 77-231

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

EDWIN NACHBAUR, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Petitioner seeks review of the denial of his request to the Board for disclosure of documents relating to the Board's investigation of petitioner's unfair labor practice charges. This case is the culmination of more than seven years of related administrative and judicial litigation.

1. On January 23, 1970, petitioner filed an unfair labor practice charge (Case No. 29-CA-1906), alleging, *inter alia*, that his employer, Efficient Instruments Corp. and Argo Instruments Corp. ("Argo"), violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. Section 158(a)(1) and (3), by discharging him for engaging in union activities. Petitioner withdrew the charge so that arbitration could proceed. The arbitration process culminated with a ruling by Mario A. Procopio, staff arbitrator for the New York State Mediation Board,

that petitioner had been discharged for just cause. On June 23, 1970, petitioner filed a second charge (Case No. 29-CA-2044) with the Board, again alleging a violation of Section 8(a)(3) and (1) of the Act. The charge was investigated by the Regional Director, who informed petitioner by letter, dated July 31, 1970, that the charge was without merit and accordingly that a complaint would not be issued.[1]

The General Counsel's Office of Appeals denied petitioner's appeal from the Regional Director's decision. Petitioner's requests for reconsideration also were denied.

Petitioner subsequently instituted a civil action (No. 71-CIV-3131) in the United States District Court for the Southern District of New York, against Irving M. Herman, then Director of the Office of Appeals. This action was dismissed on July 12, 1971.

Thereafter, on July 20, 1971, petitioner filed a *pro se* petition for review in the Second Circuit. The petition again sought review of the refusal to issue a complaint. On the Board's motion, the Second Circuit dismissed petitioner's petition. The court of appeals explained "that the refusal of the General Counsel of the National Labor Relations Board to issue a complaint is not reviewable."

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[1]The letter stated, in pertinent part:

> The investigation fails to establish that you were discharged because of your activities on behalf of Local 3, International Brotherhood of Electrical Workers or for any other discriminatory motive encompassed in your charge. Rather, the investigation tends to establish that you were discharged for insubordination. Moreover, your discharge was the subject of an arbitration hearing. See *Spielberg Mfg. Co.*, 112 NLRB 1080. Nor did the investigation establish that the Company violated the Act in any other manner encompassed in your charge.

This Court denied certiorari, 405 U.S. 931, rehearing denied, 409 U.S. 901, second motion for leave to file petition for rehearing denied, 409 U.S. 1019.

Petitioner then instituted an action (72-CIV-930) in the United States District Court for the Eastern District of New York, naming as defendants Argo and the International Brotherhood of Electrical Workers, Local Union No. 3 and their officers.[2] In connection with that action petitioner sought the full records of the Board relating to his two unfair labor practice charges (Nos. 29-CA-1906 and 29-CA-2044 (see pp. 1-2, *supra*)). Thus, on August 20, 1972, petitioner wrote a letter asking that these records be sent to the district court, and on September 7, 1972, petitioner had a subpoena served on Arthur Goldberg, assistant to the Regional Director of Region 29, where petitioner's unfair labor practice charges had been filed. The subpoena called for Goldberg to appear and "to conform with the request of [petitioner] dated August 20, 1972."

On Goldberg's motion, the subpoena was quashed by Judge Edward R. Neaher on July 17, 1973, since no date for trial or hearing had been fixed. The subpoena was reissued on December 12, 1973, however, after Judge Neaher had appointed John C. Corbett to serve as attorney for petitioner, and after the action had been referred to United States Magistrate Vincent A. Catoggio for conduct of pre-trial matters and as special master for purposes of a hearing. (The subpoena of Goldberg was accompanied by subpoenas of 11 other persons; petitioner

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[2]The complaint alleged violation of 42 U.S.C. 2000e-2(a) and (c), which forbids an employer or labor organization from discriminating against an individual on the basis of race, color, religion, sex or national origin.

also filed notice of two depositions to be taken of officers in Region 29 of the Board.)

The Magistrate issued a report on February 11, 1974, concluding, *inter alia*, that "[i]t clearly appears beyond any hope of successful contradiction that the plaintiff was discharged by Argo Instruments Corporation solely because of his own behavior," and that "[n]one of the defendants * * * was guilty of violating any statute of the United States with respect to the plaintiff during and after his employment by Argo Instruments." In regard to the subpoenas, the Magistrate concluded that "to require these prospective witnesses to appear in Court and to be subjected to interrogation by the plaintiff would be a useless, undesirable and highly unjust abuse of the judicial processes." On May 9, 1974, Judge Neaher issued an order adopting the Magistrate's report and dismissing the action.

On May 28, 1974, Judge Neaher dismissed another complaint filed by petitioner against the Magistrate and the court reporter present at the hearing in Case No. 72-CIV-930. In this new action (74-CIV-725), petitioner had sought the setting aside of the "altered minutes" of the hearing before the Magistrate on January 9, 1974, and the removal of the two defendants from public office. The Second Circuit dismissed petitioner's appeal on April 23, 1975, and this Court denied certiorari, 424 U.S. 926.

2. On April 26, 1975, petitioner wrote a letter to Edward H. Levi, Attorney General of the United States, requesting under the Freedom of Information Act (FOIA) that the Board release "[e]vidence and documents which the General Counsel of the NLRB used as premise for issuing an administrative ruling (Case No. 29-CA-2044) against me * * *." The request was referred to Samuel M. Kaynard, Regional Director of the Board's

Region 29. In a letter dated May 30, 1975, Regional Director Kaynard denied petitioner's request. Petitioner appealed this determination to the General Counsel, who denied the appeal by letter dated July 29, 1975 (Pet. App. D, pp. 10a-13a), on the ground that the documents requested are privileged from disclosure under Exemptions 5 and 7(A), (C) and (D) of the FOIA, 5 U.S.C. (and Supp. V) 552(b)(5) and 552(b)(7)(A), (C) and (D).

Petitioner thereafter filed a complaint in the United States District Court for the Southern District of New York (Pet. App. H, pp. 24a-26a), seeking, *inter alia*, the Board's release of the requested documents.[3]

On October 22, 1976, the district court issued a judgment denying petitioner's motion for appointment of counsel, and dismissing petitioner's complaint as to all the defendants on the ground that it failed to state a claim upon which relief can be granted, "and on the further ground that the instant motion is barred by the doctrine of *res judicata*" (Pet. App. B, p. 5a).[4]

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[3]Petitioner also sought documents in the possession of the New York City Police Department; his former employer, Argo Instruments; and Magistrate Catoggio of the United States District Court for the Eastern District of New York (Pet. 5).

The General Counsel of the Board did not receive a copy of the summons by mail until May 25, 1976. On June 25, 1976, petitioner filed a notice of motion for an order to amend the complaint to seek the additional relief of money damages.

[4]The district court stated that the relief sought from the Board was "[t]he only item in plaintiff's complaint which is properly before this court" (*ibid.*), and held that "[i]t is clear to me that plaintiff's complaint must be dismissed with respect to this matter * * *" (*ibid.*). The district court reasoned that "[t]he discovery sought here has already been sought in connection with a prior action brought by the plaintiff in the Eastern District of New York before Judge Neaher * * *" (*id.* at 5a-6a), and that "it appears that all matters raised in the instant complaint have been fully reviewed in the two prior proceedings before Judge Neaher" (*id.* at 6a).

Petitioner appealed to the Second Circuit and requested, *inter alia*, that the matter be remanded to the district court for consideration of petitioner's FOIA claims. Although the Board concurred in petitioner's request for remand, the court of appeals dismissed petitioner's appeal without opinion (Pet. App. A, pp. 1a-2a).

3. The only question presented in this case is whether the court of appeals erred in dismissing petitioner's appeal, apparently without considering the case on the merits.[5] That question, involving only a particular exercise of the court's discretion[6] in the peculiar circumstances of this case, does not warrant review by this Court. The facts set out above show that the court of appeals was amply justified in finally bringing to a close petitioner's litigation concerning his discharge.

In any event, had the court of appeals considered petitioner's claims on the merits, it seems plain it would have affirmed the district court's dismissal of the action on the ground that the requested materials were exempt from mandatory disclosure under the FOIA. As the

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[5]Contrary to petitioner's assumption (Pet. 2, 6), the fact that the court of appeals dismissed the appeal without opinion does not necessarily mean that the court of appeals agreed with the district court's reasoning. The Board did not believe that the doctrine of *res judicata* applied to the FOIA claim, and for that reason it concurred in petitioner's request for a remand. But for the reasons we suggest in this memorandum, the court's decision nevertheless to dismiss the appeal is an appropriate disposition of the case.

[6]"All courts, federal and state, have a broad and inherent power 'over their own process, to prevent abuses, oppression and injustice,' so 'as not to produce hardship' and to do substantial justice. * * * Utilizing its broad, inherent power, which does not depend on statute, a court will dismiss an action that is: collusive; sham; frivolous; harassing and vexatious; vexatious; vexatious and fraudulent; brought for an improper ulterior purpose; * * *" (footnotes omitted). 1 Moore's *Federal Practice*, Part 1, para. 0.60[6] (2d ed. 1977).

General Counsel of the Board explained in his letter to petitioner (Pet. App. D, pp. 10a-13a), the requested materials consist of investigatory records and intra-agency memoranda of a kind that Exemptions 5 and 7 of the FOIA (5 U.S.C. (and Supp. V) 552(b)(5) and 552(b)(7)) are designed to protect.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

OCTOBER 1977.